UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	*Criminal No. 00-63-P-H*
	)	
SILVIO RAMON GENAO,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

Silvio Ramon Genao, charged with possessing with intent to distribute heroin and conspiring with others to do the same in violation of 21 U.S.C. §§ 841(a)(1) and 846, seeks to suppress both physical evidence seized from an automobile that he had been operating and all statements made following his arrest by the Maine Drug Enforcement Agency ("MDEA") in Kittery, Maine on June 23, 2000. Indictment (Docket No. 1); Defendant's Motion To Suppress Evidence ("Motion") (Docket No. 7). An evidentiary hearing was held before me on September 18, 2000, after which counsel were permitted to file post-hearing memoranda. I now recommend that the following findings of fact be adopted and that the motion to suppress be granted in part and denied in part.

I. Proposed Findings of Fact

On June 23, 2000 at approximately 1:20 p.m. Genao, accompanied by a passenger named Manuel Garcia, drove a gray Honda into a rest stop off of Interstate 95 in Kittery, Maine. Genao pulled into a parking spot behind a welcome center. Shortly thereafter, two law-enforcement officers approached the Honda with guns drawn, commanding its occupants to put their hands up in the air.

The officers, MDEA special agents Kenneth Viger and Patrick DeCourcey, then placed Genao and Garcia face-down on the ground and handcuffed them. After Genao was handcuffed DeCourcey asked him: "Why are you here?" Genao replied that Garcia (who spoke little English) was there to meet a man named Ryan.

"Ryan" was Ryan Vaccaro, who unbeknownst to Genao and Garcia had been arrested early that morning in Portland, Maine. Law-enforcement officers in Portland, including MDEA special agent William Preis, had staked out an area near Auto Europe on Commercial Street in Portland where they expected Vaccaro to make a heroin delivery at approximately 7 a.m. At approximately 6:45 a.m. officers observed another suspect, Joseph Malia, walk to the front of Auto Europe and sit on the stairs. Fifteen minutes later Vaccaro, accompanied by his girlfriend, arrived at Auto Europe in a red Chevrolet Cavalier. The girlfriend got out of the car, and Malia got in. Police then arrested Vaccaro, who was found to be carrying eighty bags of heroin in a front pocket. Eighty additional bags of heroin and $2,000 in cash were recovered from the Cavalier.

Vaccaro was taken to the Portland police station, where he waived his Miranda rights and agreed to cooperate. He told Preis that for the past ten months he had been buying heroin from a Hispanic gentleman from Lawrence, Massachusetts who was known as "Carlos" but whose real name was "Luis." Carlos always sent two Hispanic males as "runners" to deliver the heroin to Vaccaro. One, who did not speak English, was always there. The other one varied. The runners, who would arrive in a small Toyota or Honda often a little gray car most recently had been meeting Vaccaro at the Kittery rest stop. They generally carried six hundred to a thousand bags of heroin.

Vaccaro agreed to call Carlos to place a heroin order and to allow law-enforcement officers to monitor his ensuing cell-phone conversations. From the police station, Vaccaro placed his order and pretended to be driving to the Kittery rest stop, making or receiving a number of calls from Carlos and

from the runners to track their progress while law-enforcement officers set up surveillance at the rest stop. Carlos informed Vaccaro among other things that he intended to use "the kid that speaks English," whom Vaccaro knew as one of the regular runners. At approximately 1:20 p.m. a law-enforcement officer stationed near the rest-stop entrance observed a small gray Honda with Massachusetts license plates, occupied by two Hispanic males, enter the rest stop. Preis also relayed to his supervisor, Scott Pelletier, who was present at the rest stop, that the runners had told Vaccaro that they were parking in the back. Viger and DeCourcey then approached the Honda with guns drawn.

After DeCourcey handcuffed Genao he, MDEA agent Frank Stepnik and a Maine state trooper escorted Genao to a small janitor's outbuilding for the purpose of searching Genao's person. DeCourcey removed the handcuffs and inquired whether Genao had any heroin on his person. Genao quickly replied, "No." DeCourcey next asked whether there was any heroin on Garcia's person, and Genao quickly responded, "I don't think so." DeCourcey then asked whether there were any drugs in the Honda. Genao responded with a blank look that DeCourcey took to be an acknowledgement that drugs were in fact present there. DeCourcey then instructed Genao to undress and thoroughly searched his person, finding nothing. DeCourcey next told Genao that if there were any drugs in the vehicle he would find them. He then twice conveyed to Genao in a conversational tone of voice a message to the effect that "it would be much better for you and in the eyes of the court if you would just tell us where they [the drugs] are so we don't have to tear the car apart."[1] Genao stated that the drugs could be found in an air vent in the car. During the five to ten minutes that he was in the outbuilding Genao was cooperative, never raised his voice and showed no signs of agitation; however, he appeared to be nervous inasmuch as he was visibly shaking. No *Miranda* warning was given.

[1] DeCourcey did not remember his exact words. He testified that the message also could have been something like: "It will make it easier on you and on us if you tell us," or "It will make you look better, and we will not have to tear the car apart."

Two MDEA special agents had begun searching the Honda and had called for a drug-sniffing police dog when Pelletier relayed the information that the drugs were in an air vent. One of the special agents removed the passenger-side air vent; the other, Gerard Hamilton, saw a tube wrapped in silver duct tape protruding from the inside of the air vent. The tube ultimately was found to contain 1,030 bags of heroin.

Had Genao's admission not led to the discovery of the drugs, Hamilton would have continued searching the entire vehicle, using the services of a drug-sniffing dog if available and transporting the vehicle if necessary to a state police barracks where it could have been elevated on a jack and dismantled. In Hamilton's experience, drug-sniffing dogs can locate drugs in areas in which it is difficult for officers to locate them. Had the vehicle been taken to a state-police barracks, the air ducts would have been searched.

After Genao was searched, he was taken from the outbuilding and placed in the back seat of a police cruiser. Perhaps forty to fifty minutes after the initial arrest, special agent Viger noticed that Genao was slumped over in the cruiser seat and that his eyes were droopy. He asked whether Genao was feeling well and offered to call an ambulance or take him to a hospital. Genao explained that he had recently been diagnosed as diabetic, had not eaten and needed some sugar. Viger obtained a bottle of orange juice. Genao drank the juice and perked up, seeming thereafter to be fine.

Viger was assigned to transport Genao to the York County Jail. During the forty-minute drive Genao asked what was going on, but Viger said he did not want to talk without giving a *Miranda* warning. At 3:30 p.m. approximately thirty-five minutes after Viger and Genao arrived at the jail and following completion of the booking process Viger obtained an interview room and spoke alone with Genao. Viger stated that he wanted to ask Genao a few questions. Genao, whose demeanor was peaceful and cooperative, responded that he wanted to tell Viger everything. Viger

read Genao word-for-word a *Miranda* warning that had been printed on a sheet of paper. Genao responded, "Yes," to each question, including: "Anything you say can and will be used against you in a court of law. Do you understand that?" Viger finally asked: "Now, having all those rights which I just explained to you in mind, do you wish to answer questions at this time?" Genao responded, "Yes," and affixed his signature to a section of the paper titled "Waiver."

Viger then asked Genao to tell him what happened that day, stating that it was in Genao's best interest to cooperate. Genao said he wanted to cooperate. He asked whether he would be held in jail or would be able to go home and whether his parents would be contacted. He explained that he was the sole support for his retired parents and was worried about them. Viger responded that he would not be calling Genao's parents and that Genao should contact them. Genao then told Viger that he had been paged with a certain code that meant he was to go to a place in Lawrence, pick up a package, drive to Maine and deliver it to Ryan. Garcia would exchange the package for cash. Genao would take $500 of the cash and return the remainder to the same spot where he had picked up the package. At the conclusion of this oral statement Genao made a written statement that he signed in Viger's presence. Viger found Genao's English to be "fine." Genao spoke with a slight accent, but there were no language barriers.

II. Discussion

Genao moves to suppress (i) statements made at the scene of his arrest, (ii) physical evidence recovered from the Honda and (iii) later statements made at the York County Jail. Defendant's Post-Hearing Memorandum ("Defendant's Memorandum") (Docket No. 10) at 4. The government concedes that Genao's pre-*Miranda* statements to DeCourcey in the parking lot and the outbuilding are inadmissible. Government's Post-Hearing Memorandum ("Government's Memorandum") (Docket No. 9) at 1 n.1. The government nonetheless presses for admission of (i) the physical evidence

inasmuch as it would inevitably have been discovered even had Genao remained silent, *id*. at 5-6, and (ii) the York County Jail statements on the ground that the mere failure to have given a *Miranda* warning prior to the earlier voluntary statements does not bar admission of the later, properly warned ones, *id*. at 2-5.

The government in seeking admission of the seized heroin relies primarily on the so-called "inevitable discovery rule." *Id*. at 5-6. Pursuant to this rule, "[i]f the prosecution can establish by a preponderance of the evidence that the [unlawfully obtained] information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received." *Nix v. Williams*, 467 U.S. 431, 444 (1984). Application of the rule entails consideration of three questions: "[A]re the legal means truly independent; are both the use of the legal means and the discovery by that means truly inevitable; and does the application of the inevitable discovery exception either provide an incentive for police misconduct or significantly weaken fourth amendment protection?" *United States v. Ford*, 22 F.3d 374, 377 (1st Cir. 1994) (citation and internal quotation marks omitted).

The prosecution in this case makes a sufficient showing of both independence and inevitability. The search of the Honda had already commenced when Genao's statement was conveyed to the searchers. Hamilton testified, and there is no reason to doubt, that officers would have persisted in that search until drugs were found, using a drug-sniffing dog and/or dismantling the Honda if necessary. Genao presents no argument that the application of the exception in this case would significantly weaken Fourth Amendment protections or provide an incentive for police misconduct. *See generally* Defendant's Memorandum.

Nor can there be any question that this was a search by lawful means. Officers had ample probable cause, based on Vaccaro's confession and his monitored conversations, to believe that the

Honda contained heroin. No more was required. *See, e.g., Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (existence of "abundant probable cause" that car contained contraband "alone satisfie[d] the automobile exception to the Fourth Amendment's warrant requirement").[2]

Turning next to the admissibility of statements, the government asserts that inasmuch as Genao's statements to DeCourcey were "voluntary" and his later *Miranda* waiver valid, his statements to Viger are admissible. Government's Memorandum at 2-5. Genao contends that his statements to DeCourcey were coerced, blighting the admissibility of his later statements to Viger. Defendant's Memorandum at 4-6.

Even assuming *arguendo* that Genao's statements to DeCourcey were coerced, I find his later statements to Viger nonetheless admissible. In cases in which an initial, unwarned statement is involuntary (*e.g.*, the product of coercive police conduct), a subsequent statement is not automatically rendered inadmissible. *See, e.g., United States v. Esquilin*, 208 F.3d 315, 319-20 n.4 (1st Cir. 2000). Rather, the court must compare the circumstances of the initial and subsequent statements to determine whether the taint of the former seeps into the latter. *See, e.g., United States v. Marenghi*, 109 F.3d 28, 33 (1st Cir. 1997). Three factors weigh heavily in the scales of this assessment: "the change in the place of the interrogations; the time that passed between the statements; and the change in the identity of the interrogators." *Id*.

In this case, all three factors counsel in favor of admission of the Viger statements. A period of nearly two hours elapsed between the questioning by DeCourcey and that by Viger. Both the locale

[2] Genao further notes that in the context of the inevitable-discovery rule, "many federal jurisdictions subscribe to a second prong, requiring that the Government be actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation. . . . It is unclear whether Maine has adopted this alternative prong." Defendant's Memorandum at 6. He argues that the government did not meet this burden inasmuch as he was being questioned in the outbuilding before officers initiated calls for a drug-sniffing dog. *Id*. at 6-7. In fact, the First Circuit has declined to adopt the "alternative prong." *See, e.g., United States v. Zapata*, 18 F.3d 971, 978 n.6 (1st Cir. 1994) ("The fact that legal means of discovery are underway at the time an unlawful search transpires is highly relevant to, though not a requisite of, the inevitable discovery inquiry."). In any event, regardless of the precise point at which searching officers called for a drug-sniffing dog, it is clear that they had commenced a lawful search of the Honda prior to learning of Genao's (continued…)

and the identity of the interrogator had changed. Rather than being in a cramped outbuilding with DeCourcey and two other law-enforcement officers (neither of whom was Viger), Genao was alone with Viger in a private interview room at the York County Jail. Viger's conduct was restrained and professional. He had obtained orange juice for Genao after noticing that Genao was slumping in a cruiser back seat and had deliberately avoided discussing Genao's case during the forty-minute ride to the jail, waiting to do so until the booking process was complete and a full *Miranda* warning given. These facts constituted a sufficient break in the action to purge any taint flowing from the prior statement to DeCourcey. *See, e.g., id*. at 33-34 (upholding denial of motion to suppress statements dictated in police-station lunch room several hours after unwarned roadside statements).

III. Conclusion

For the foregoing reasons, I recommend that the defendant=s motion to suppress evidence be **GRANTED** as to all statements made by Genao at the scene of his arrest (the Kittery rest stop) and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge=s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court=s order.

Dated this 26th day of September, 2000.

statement.

David M. Cohen
United States Magistrate Judge

U.S. District Court
District of Maine (Portland)

CRIMINAL DOCKET FOR CASE #: 00-CR-63-ALL

USA v. GENAO Filed: 07/12/00
Dkt# in other court: None

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